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IN THE

Supreme Court of the United States

October Term, 1961

No. [redacted] 68

NATHANIEL WRIGHT, CHARLES L. SMART, RASCO WHITE, JAMES W. THOMAS, BENJAMIN CARTER, JUDSON FORD,

Petitioners,

—v.—

STATE OF GEORGIA,

Respondent.

REPLY TO BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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Petitioners,

—v.—

STATE OF GEORGIA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF GEORGIA

PETITIONERS' REPLY TO BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Petitioners have received respondent's Brief in Opposition to the Petition for Writ of Certiorari filed in this case and hereby reply pursuant to Rule 24(4) of the Rules of this Court.

I.

Mode of Raising Constitutional Questions

Respondent argues that where a state court has declined to pass upon a constitutional question for alleged failure to raise the question properly this Court may pass upon it only where the state has applied the procedural rule inconsistently. But this Court has in many instances found such refusal unreasonable for reasons other than incon-

sistent application. *Terre Haute I. R. Co.* v. *Indiana*, 194 U. S. 579, 589; *Union P. R. Co.* v. *Public Service Commission*, 248 U. S. 67 and *Staub* v. *Baxley*, 355 U. S. 313.

As in *Staub*, the mode of avoiding the constitutional question here presented also fails to meet a bare minimum of intrinsic fairness and reasonableness. This Court never has been precluded from examining the particular application of a state procedural rule to assure that it is not in essence an evasion of the federal questions on frivolous grounds. *Rogers* v. *Alabama*, 192 U. S. 226, 230 and *Van Dalia R. R. Co.* v. *Indiana, ex rel. South Bend*, 207 U. S. 359, 367.

Statement of the Facts

Despite State efforts to characterize the arrests as having nothing to do with the race of the petitioners, the fact remains that the arresting officer testified "one reason [for the arrest] was because they were Negroes" (R. 53). Moreover, respondent also concedes squarely in its brief the very fact it claims was not made out by the record, that the race of petitioners was the material factor in the arrest:

> The fact that these defendants were adult Negro men on a children's playground in a white residential area and that cars were beginning to assemble all contributed to a fear that there would be a breach of the peace if the defendants continued to use the playground. (Brief in Opposition, p. 10.)

The fact that it is a crime in Georgia for Negroes to play on a white basketball court, although the statute gives no fair warning thereof, is what—in this context—renders the law vague. Petitioners were not warned in any manner of potential differential treatment solely because of race.

Respondent alleges another cause for the arrests: that petitioners violated the Recreational Department's rules. This allegation distorts the record. The arresting officer did not "know the rules of the city's recreational department" (R. 52). He came to the basketball court solely because he was told by a "white lady" that some "colored people were playing in the basketball court" (R. 52). He had no information at that point that any infraction of playground rules was occurring (R. 52) nor did he testify that he saw any such infraction upon arriving at the scene.

Respondent states that the testimony of the superintendent of the recreational department shows that petitioners were arrested because they were "grown men" on a "children's playground" and were dressed in street clothes.[1] This witness's testimony is to the contrary. He testified that under the rules of the Recreation Department the basketball courts could be used by adults (R. 56) (and, therefore, the petitioners were not on a playground exclusively for children), and that it would not be improper to wear street clothes in unsupervised play (R. 56). He further testified that although the school used the area during school days, the courts could be used by anyone if children were not actually there (R. 58). The arrests were made at 2:00 in the afternoon when the children were not present but were in school (R. 53). Mr. Hager's general comments that the Recreation Department might employ a nondiscrimination policy could not change the character of the arrests as attempts to enforce segregation because his office had intervened in no way (He learned of the arrests after they had been made [R. 54]), and the arresting officer was not aware of the Recreation Department's rules (R. 52).

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[1] Respondent's brief, p. 10, 2nd paragraph and see p. 13, 2nd paragraph.

Even if the respondent had been able to establish that the one ground for the arrests was violation of playground rules, this could not sustain the judgment below in the face of clear rulings by this Court for one basis of the conviction was race. And as stated in *Williams* v. *North Carolina*, 317 U. S. 287, 292, "[I]f one of the grounds for conviction is invalid under the Federal Constitution, the conviction would not be sustained."

CONCLUSION

WHEREFORE, for the foregoing reasons, it is respectfully submitted that the petition for writ of certiorari should be granted.

Respectfully submitted,

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